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Washington Federal v. Hulsey Respondent's Brief 3 Dckt. 43936

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IN THE SUPREME COURT OF THE STATE OF IDAHO

WASHINGTON FEDERAL, successor by merger to
South Valley Bank & Trust,

Plaintiff-Appellant/Cross-Respondents,

vs.

MICHAEL R. HULSEY, individually; SM
COMMERCIAL PROPERTIES, LLC, an Idaho limited
liability company; JOHN and JANE DOES I-X; and
WHITE CORPORATIONS I-X,

Defendants-Respondents/Cross-Appellants.

Supreme Court Docket
Nos. 43936-2016
(44190-2016)

Shoshone County No.
CV-2014-55

**CROSS-APPELLANTS' REPLY BRIEF
IN SUPPORT OF CROSS-APPEAL**

**Appeal from the District Court of the First Judicial District
of the State of Idaho, in and for Shoshone County**

The Honorable Benjamin R. Simpson, District Judge, Presiding

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I. STATEMENT OF THE CASE.

A. Nature of the Case.

Following entry of a stipulated final Judgment and Decree of Foreclosure, from which neither party took an appeal, the District Court tried Washington Federal's singular remaining claim which sought entry of a deficiency judgment against Hulsey. Following trial, the District Court entered judgment in favor of Hulsey and against Washington Federal. Both Washington Federal and Hulsey requested an award of attorney fees. The District Court denied both requests. Washington Federal appealed from the District Court's Order and Judgment denying Washington Federal's request for an award of fees. Hulsey filed a cross-appeal. Hulsey's original argument in support of his cross-appeal was set forth in his Respondents' Brief (filed with this Court on November 10, 2016) at Sections IV.C and E (pp. 36-39 and 41). This Brief constitutes Hulsey's Reply Brief in support of his cross-appeal. Hulsey asserts that the District Court erred in denying his request for an award of attorney fees as the prevailing party in proceedings related to Washington Federal's claim for entry of a deficiency judgment.

B. Course of Proceedings.

Pursuant to the terms of a stipulated Judgment and Decree of Foreclosure (prepared by Washington Federal), trial was had before the District Court on "the sole remaining issue after Sheriff's Sale of the fair market value of the [foreclosed upon] property as of the date of the foreclosure sale...." R., Vol. 3, pp. 736-42. Following trial, another Final Judgment was entered,

this one in favor of Respondents/Cross-Appellants Michael R. Hulsey and SM Commercial Properties, LLC (who are collectively referred to in this Brief as “Hulsey”) and against Washington Federal. R., Vol. 7, pp. 1751-52. The District Court held that Washington Federal had “failed to meet its burden of proof to establish either the fair market value of the subject property on March 5, 2015 or the existence of a deficiency.” R., Vol. 6, p. 1477; Vol. 7, pp. 1751-52.

Washington Federal and Hulsey both timely requested that the District Court award them attorney fees and costs incurred in proceedings following entry of the August 18, 2014 stipulated Judgment and Decree of Foreclosure. Washington Federal based its request for fees and costs on a breach of contract claim, relying upon the terms of the underlying Promissory Note and Deed of Trust. R., Vol. 6, pp. 1479-80.¹ Hulsey requested an award of attorney fees pursuant to I.C. §12-120(3), as the prevailing party in the deficiency judgment action. R., Vol. 7, pp. 1510A.

The District Court denied both parties’ requests. R., Vol. 7, pp. 1715-23; 1754-56. Since Washington Federal had already filed a Notice of Appeal from the District Court’s Final Judgment denying Washington Federal relief on its claim for a deficiency judgment, Hulsey’s appeal from the District Court’s denial of his request for an award of attorney fees and costs was in the nature of a cross-appeal. In his initial Respondent’s brief filed with this Court on November 10, 2016, Hulsey incorporated argument in support of his cross-appeal at Sections IV.C and E (pp. 36-39 and 41).

¹ Washington Federal requested an award of costs and attorney fees “pursuant to Rule 54 of the Idaho Rules of Civil Procedure, the parties’ Promissory Note, Deed of Trust, and related loan documentation.” R., Vol. 7, p. 1480.

This Brief is submitted by way of reply in support of Hulsey's cross-appeal. Hulsey respectfully urges this Court to find that the District Court erred in denying Hulsey's request for an award of attorney fees and costs as the prevailing party in the deficiency judgment action.

C. Statement of Facts.

Hulsey previously set forth his "Statement of Facts" at Section I.C. of his Respondents' Brief (filed with this Court on November 10, 2016). Said "Statement of Facts" is incorporated herein and will not be repeated

II. ISSUES PRESENTED IN HULSEY'S CROSS-APPEAL.

1. Whether the District Court erred in denying Hulsey's request for an award of the attorney fees and costs he incurred in the deficiency judgment action following entry of the stipulated Judgment and Decree of Foreclosure?²
2. Whether Hulsey is entitled to an award of attorney fees and costs incurred on appeal?³

III. STANDARD OF REVIEW.

Hulsey's cross-appeal seeks a reversal of the District Court's Order and Judgment denying Hulsey's request for an award of attorney fees and costs as the prevailing party in the deficiency judgment action. The appropriate standard of review was set forth by this Court in Contreras v. Rubley, 142 Idaho 573, 130 P.3d 1111 (2006):

² This issue was originally stated as issue No. 5 at Section II (p. 11) of Hulsey's Respondents' Brief (filed with this Court on November 10, 2016).

³ This issue was originally stated as issue No. 6 at Section II (p. 11) of Hulsey's Respondents' Brief (filed with this Court on November 10, 2016).

The District Court's decision to award attorney fees is a discretionary decision, subject to the abuse of discretion standard of review. To determine whether the trial court abused its discretion, this Court considers (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason.

When the award of attorney fees depends on the interpretation of a statute giving rise to that award, however, a different standard of review applies. The interpretation of a statute is a question of law over which this Court exercises free review. Whether the language of a statute is unambiguous, the plain meaning of the statute will govern and there is no need to consult extrinsic evidence.

Contreras v. Rubley, 142 Idaho at 576 (citations omitted). In other words, if the District Court's decision to deny fees was predicated upon its interpretation of a statute or rule, this Court exercises free review over the District Court's decision. If the District Court's decision was not predicated upon interpretation of a statute or rule, then this Court reviews the District Court's decision under an abuse of discretion standard.

IV. ARGUMENT.

A. The Parties Sought Attorney Fees Under Wholly District Bases.

In its Second Amended Complaint, Washington Federal asserted the following claims for relief: Claim 1 (requesting the appointment of a receiver) and Claim 2 (for judicial foreclosure). R., Vol. 2, pp. 316-49. Washington Federal further sought an award of attorney fees "pursuant to the loan documents," which were defined to include the Promissory Note (Exhibit D to the Second Amended Complaint) and the Deed of Trust (Exhibit C to the Second Amended Complaint). Id. at

p. 31.

The Promissory Note, constituting a contract between Hulsey and Washington Federal, includes an attorney fee provision that provides:

Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, subject to any limits applicable law, Lender's attorney's fees and Lender's legal expenses, whether or not there is a lawsuit, including attorney's fees, expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay or injunction), and appeals. If not prohibited by applicable law, Borrower also will pay any court costs, in addition to all other sums provided by law.

R., Vol. 2, pp. 355-56. The Deed of Trust also includes a contractual provision regarding Washington Federal's ability to seek attorney fees. R., Vol. II, p. 360. The bases for both claims lies in contract.

Washington Federal acknowledged that its claim for attorney fees was predicated entirely upon this contractual claim. In Washington Federal's "Motion for Award of Attorneys' Fees and Costs," Washington Federal sought attorney fees "pursuant to Rule 54 of the Idaho Rules of Civil Procedure, the parties' Promissory Note, Deed of Trust and related loan documentation." R., Vol. 6, p. 1480 (emphasis added).⁴

⁴ One of many problems inherent with Washington Federal's request for attorney fees was the fact that Washington Federal had not preserved a breach of contract claim for an award of attorney fees or costs. Pursuant to the term of the parties' stipulated Judgment and Decree of Foreclosure (entered August 18, 2014), the only claim preserved by Washington Federal was its claim for entry of a deficiency judgment. R., Vol. 3, p. 739. That stipulated Judgment, drafted by Washington Federal, provides: "That the Court specifically retains jurisdiction to determine the sole remaining issue after Sheriff Sale of the fair market value of the [foreclosed upon] property as of the date of the foreclosure sale for the purpose of determining whether Plaintiff is entitled to entry of a

On the other hand, Hulsey's claim for attorney fees, which is the subject of this cross-appeal, was made pursuant to I.C. §12-120(3). In Hulsey's answer to Washington Federal's Second Amended Complaint, Hulsey affirmatively alleged that Washington Federal was "not entitled to any deficiency judgment," and sought an award of attorney fees under I.C. §12-120(3). R., Vol. 2, p. 417. Hulsey sought an award of attorney fees in an action arising out of a commercial transaction. There can be no serious argument, on the part of Washington Federal, that its claim for a deficiency judgment was a claim in the nature of a "commercial transaction." In fact, in its Second Amended Complaint, Washington Federal itself claimed entitlement to an award of fees under I.C. §12-120(3). R., Vol. 2, p. 346.

B. Based Upon the Procedural Status of this Case, the District Court Abused its Discretion by Holding that Hulsey was not the Prevailing Party in the Deficiency Judgment Action.

By stipulation of the parties, drafted Washington Federal, this action was bifurcated into two proceedings: (1) one which sought the appointment of a receiver and the entry of a decree of foreclosure; and (2) one which sought entry of a deficiency judgment. A stipulated Judgment was entered in the first such proceeding, certified as final under IRCP 54(b), and no appeal was taken. The remaining proceeding involved solely Washington Federal's claim for entry of a deficiency

deficiency judgment against Defendant Michael R. Hulsey." R., Vol. 3, p. 739 (emphasis added). That Judgment was certified as final (R., Vol. 3, p. 741), and no appeal was taken. By the clear language of the stipulated Judgment and Decree of Foreclosure, Washington Federal no longer had a breach of contract claim for an award of attorney fees or costs. In fact, the stipulated Judgment and Decree of Foreclosure specifically awarded Washington Federal its pre-deficiency judgment attorney fees of \$66,183.95 together with expenses of foreclosure totaling \$5,761.73. *Id.* at p. 737.

judgment. There is no dispute that Washington Federal prevailed on the first of the two proceedings. In fact, Hulsey stipulated to entry of an order appointing a receiver as well as entry of a Judgment and Decree of Foreclosure. Washington Federal was awarded the attorney fees it incurred in relationship to the receivership and foreclosure action, by stipulation, and Washington Federal took no appeal from that final Judgment.

The sole relief sought by Washington Federal for entry of a deficiency judgment of some \$700,000 was denied in its entirety. Under the unique procedural posture of this case, Hulsey respectfully submits the District Court abused its discretion by finding that Hulsey was not the prevailing party for purposes of the deficiency judgment action.

This Court has held:

[W]e agree with [the] argument that the determination of which party has prevailed is not a matter of mechanical measurement of the size of each party's respective recovery. Instead, the trial court should analyze each claim separately. Where both parties have successfully asserted claims, the claims should be severed and costs analyzed separately for each....

Ramco v. H-K Contractors, Inc., 118 Idaho 108, 113, 794 P.2d 1381 (1990). While Washington Federal makes much ado about the fact that the District Court granted Washington Federal's request for the appointment of a receiver and entered a decree of foreclosure, Washington Federal does not apprise this Court that both forms of relief were entered by stipulation. Moreover, Washington Federal did not apprise this Court that prior to entry of the stipulated Judgment and Decree of Foreclosure, and nearly a year and a half before the District Court entered Judgment denying

Washington Federal relief on its claim for a deficiency judgment, Hulsey offered to deed the property to Washington Federal in full satisfaction of its claim. R., Vol. 6, p. 1540A.

Washington Federal's assertion that no one prevailed in the deficiency action is disingenuous. Washington Federal argues that Hulsey commissioned an appraisal that inferred the existence of a deficiency. See Appellant's Brief at p. 43. Washington Federal does not apprise this Court that the basis for Washington Federal's claim was an exhibit that was not admitted at trial (Washington Federal's proposed Trial Exhibit No. 39). Essentially, Washington Federal lost at trial and now requests this Court's assistance based upon an exhibit neither received nor admitted at trial. The Court should not countenance such chicanery.⁵

C. Hulsey is Entitled to An Award of Attorney Fees Incurred in the Successful Defense of the Deficiency Judgment Action Pursuant to this Court's Holding in Hoffer v. Shappard.

On September 28, 2016, this Court entered its opinion in Hoffer v. Shappard, 160 Idaho 870, 380 P.3d 681 (2016). In the cited case, this Court held that an award of attorney fees would be prospectively appropriate, under I.C. §12-121, in cases finally adjudicated after March 1, 2017,

⁵ Washington Federal's misrepresentations regarding proceedings before the District Court, in the context of Hulsey's claim as the "prevailing party" in the deficiency judgment action, are not limited to Washington Federal's attempt to introduce evidence after judgment was entered. Washington Federal claims that Hulsey "contested the receivership," "refused to agree to foreclosure," and "contested summary judgment." See Washington Federal's opening Brief on appeal filed September 2, 2016 (at p. 42). The record wholly belies Washington Federal's claim. Washington Federal even suggests that Hulsey (as opposed to SM Commercial Properties, LLC) filed a "frivolous Chapter 11." Id. If the Chapter 11 was frivolous, why didn't Washington Federal request an award of attorney fees against SM Commercial Properties, LLC in proceedings before the United States Bankruptcy Court?

“when justice so requires.” Hulsey respectfully submits, based on those reasons set forth in his Respondents’ Brief and this Brief, that the District Court’s Order denying his request for an award of attorney fees incurred in the successful defense of the deficiency judgment action be reversed and that he be awarded fees in the amount of \$31,440. R., Vol. 6, pp. 1510-17. Washington Federal brought suit and Hulsey stipulated to Washington Federal’s request for relief in the form of the appointment of a receiver and entry of a Judgment and Decree of Foreclosure. Hulsey appropriately opposed Washington Federal’s sole remaining claim for entry of a deficiency judgment. Under the facts and circumstances, “justice should require” that Hulsey be awarded the requested fees. The entire proceeding was unnecessary. Washington Federal refused to accept a deed in lieu of foreclosure and instead persisted in litigating for a year and a half without any positive outcome.

D. Cross-Appellants Hulsey and SM Commercial Properties, LLC Request an Award of Attorney Fees and Costs on Appeal.

Cross-Appellants Hulsey and SM Commercial Properties, LLC request an award of attorney fees on appeal, pursuant to I.C. §§12-120(3) and IAR 41. As was also set forth in the Cross-Appellants’ Response Brief, said parties also request an award of fees pursuant to I.C. §12-121 as interpreted by this Court’s opinion in Hoffer v. Shappard, *supra*.

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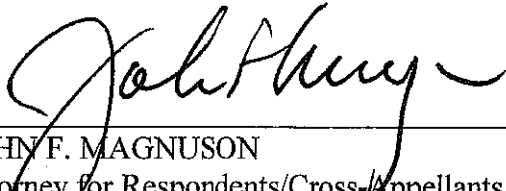
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V. CONCLUSION.

Based upon the reasons and authorities set forth above, Cross-Appellants Michael R. Hulsey and SM Commercial Properties, LLC respectfully request that this Court reverse the District Court's Supplemental Judgment award Hulsey and SM Commercial Properties, LLC the sum of \$31,440 in attorney fees incurred in their successful defense of the deficiency judgment claim, together with fees and costs incurred on appeal.

Dated this 10th day of January, 2017.



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